Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS
CLERK

No. 83-436

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

DONALD REGAN,
Secretary of the Treasury, et al,

Petitioners

v.

RUTH WALD, et al,

Respondents.

On petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE UNITED STATES, WASHINGTON OFFICE ON LATIN AMERICA, COUNCIL ON HEMISPHERIC AFFAIRS, AND THE SOCIETY OF AMERICAN LAW TEACHERS

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March 14, 1984

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INTERESTS OF AMICI CURIAE

THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA (NCC) is composed of 31 member denominations, Protestant, Episcopal and Orthodox, whose combined membership is over forty milliion persons.

The NCC includes among its expressed purposes "to study, speak, and act on conditions and issues in the nation and the world which involve moral, ethical, and spiritual issues inherent in the Christian gospel." Through its Division of Overseas Ministries, NCC maintains communication links with churches and councils throughout the world, including Cuba. Through its Human Rights Office, NCC investigates and expresses concerns about human rights violations.

WASHINGTON OFFICE ON LATIN AMERICA (WOLA) is a constituency based human rights

organization. It is a non-profit organization funded by 40 different religious organizations, foundation grants and personal contributions. It produces reports on Latin America, conducts public education functions, and facilitates exchanges between Latin Americans and citizens of the United States.

COUNCIL ON HEMISPHERIC AFFAIRS (COHA) is a non-profit organization specializing in research and education concerning Latin America. COHA's constituency is reflected in its Board of Directors, which consists of national presidents of trade unions, professional and academic organizations, as well as religious leaders and members of Congress. COHA publishes reports on press freedom and an annual report on human rights in Latin America, including Cuba. COHA sponsors education programs on Latin America and promotes interchanges between Latin and North Americans.

THE SOCIETY OF AMERICAN LAW TEACHERS (SALT) is a non-profit organization composed of approximately 600 law professors in law schools around the country. SALT supports the free exchange of people and ideas among all nations. SALT is particularly concerned that the regulations restricting travel to Cuba prevent teachers and students from the United States from participating in international meetings and from expanding their knowledge about Cuba in general and about Cuban laws and its legal system.

These organizations share the belief that travel to Latin America, including Cuba, is essential to their goals and purposes. Primarily concerned with educating and providing information, the amici curiae believe that prohibiting or limiting travel to Cuba seriously thwarts their objectives. There is no viable or adequate substitute for the knowledge that can be obtained only by

travelling to another country. The amici curiae also seek to promote better relations and understanding between the United States and the countries of Latin America and believe that travel furthers these interests. Indeed, it is the position of amici curiae that travel is essential to stability in the region.

SUMMARY OF ARGUMENT

I

This case involves a narrow question of statutory interpretation but raises fundamental questions of accountability of the Executive to Congress and the public. The decision of the Court of Appeals merely required the President to follow the procedural requirements of the International Emergency Economic Powers Act, 50 U.S.C. §1701 et seq. (IEEPA), and does not limit any authority the President may have to

promulgate such regulations if the procedures are met.

IEEPA's requirements of a declaration of national emergency before imposing new economic sanctions on foreign nations and a public explanation of the reasons for the sanctions are part of a series of statutes enacted by Congress in the aftermath of unilateral and often secretive activities of the Executive Branch during the Vietnam War. They are designed to involve Congress in the decisionmaking process and to permit public opinion to be heard on precipitous actions that may pose grave dangers to peace. The procedures required by IEEPA are particularly important in light of the limitations which the Constitution places on Congressional vetoes of Executive regulations, Immigration and Nationalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983) and because regulations

concerning a "military or foreign affairs function" are exempt from the notice and comment requirements of the Administrative Procedure Act.

The Government's concern about "rigidity" in the IEEPA procedures is properly addressed to Congress which imposed the requirements. As Justice Powell explained in a similar context, "[t]o be sure, the President may have preferred unrestricted power but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority." Id., 103 S. Ct. at 2796 (concurring opinion).

II

The travel-restricting regulations prevent most Americans from travelling to Cuba.[1] The exceptions for professional

[1] Counsel for Amici obtained 240 pages of documents from the Department of the Treasury pursuant to a Freedom of Information Act request for all opinions [cont'd. on next pg]

researchers is quite narrow; it is applicable only to Cuba specific research and to full time professionals. For example, among a wide range of professional conferences off-limits to United States scientists in 1983 were conferences on the drug Interferon and on sugar cane technology. The regulations also inhibit the activities of human rights groups which must have representatives conduct on the scene investigations and must meet with officials in foreign countries to express concern if human rights violations are found to exist. Further, the regulations inhibit the person-to-person relationships which contribute to the development of mutual understanding and the reduction of tensions between nations and their people.

The restrictions on travel are a direct

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and interpretations of the regulations. These documents are cited herein under the heading "FOIA Request."

result of the regulations restricting expenditures for travel. This Court has recognized that the exercise of fundamental rights may require the expenditure of funds. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976).

The almost total prohibition on travel imposed by the regulations unconstitutionally restricts travel. The prohibition was enacted under circumstances which the President has not seen fit to describe as a national emergency. Absent emergency conditions, the fundamental right to travel to a country cannot be almost totally denied simply as a means of influencing the policy of the government of that other country. To the extent that the regulations were designed to prevent a large flow of dollars to Cuba at a future date when and if Cuba were to develop extensive tourist facilities, the prohibition is premature and hence not the

least restrictive alternative available to the Government. There is ample time when a Cuban tourist industry becomes a reality for restricting travel; it is the flow of dollars to Cuba, not the construction of hotels, that the Government asserts is its interest in restricting travel.

ARGUMENT

I

THE PROCEDURAL REQUIREMENTS OF IEEPA ARE VITALLY NECESSARY TO INSURE ACCOUNTABILITY OF THE EXECUTIVE, THE OPPORTUNITY FOR CONGRESSIONAL INPUT AND THE EXPRESSION OF PUBLIC OPINION IN THE VOLATILE CIRCUMSTANCE OF IMPOSITION OF NEW ECONOMIC SANCTIONS ON OTHER COUNTRIES.

This case presents a narrow question of statutory interpretation, yet one which involves the most fundamental question of accountability of the Executive to the Congress and the public. The Court of Appeals merely held that the Treasury Department, in promulgating the travel restricting regulations, "concededly did not follow the 'consultative procedures' mandated by the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 -- procedures aimed at focusing the attention of Congress as well as the President on the need

for the restrictions of the sort at issue here." 708 F. 2d at 795. The decision of the Court of Appeals itself does not inhibit the power of the President to promulgate the very same travel-restricting regulations so long as the President follows the procedures for public accountability of IEEPA. Whether the 1978 amendments to the Passport Act, Pub. L. 95-426, 22 U.S.C. § 211a, or the Constitution, prohibit such travel-restricting regulations are questions which this Court, in affirming, need decide only when, and if, the President chose to again promulgate them in accordance with IEEPA procedures.

The fundamental concern in this case is the ability of Congress to retain a role in foreign policy decision-making and to require the President to act in an open and publicly accountable manner when undertaking to engage in what is essentially economic warfare with

another nation. Ever since Marbury v. Madison, 1 Cranch 137 (1803), it has been the function of the federal courts to compel adherence to the law by officials of government and to invalidate acts of officials in excess of their lawful powers. That exercise of these historic powers of the federal courts is reflected in the decision of the Court of Appeals herein.

Except in wartime, IEEPA requires first that the President "in every possible instance, shall consult with the Congress before exercising any of the authorities" granted by IEEPA. 50 U.S.C.A. § 1703(a) (Supp. 1983). Before imposing economic sanctions, the President must declare a national emergency in response to an "unusual and extraordinary threat" to the national security, 50 U.S.C.A. § 1701 (Supp. 1983) and the authority exercised by the President must be limited to that specific national

emergency. Any new threat must be met by a new declaration of national emergency. Id. Once the President invokes sanctions, he must "immediately transmit" a report to Congress specifying (1) "the circumstances which necessitate such exercise of authority, (2) why the President believes those circumstances constitute an "unusual and extraordinary threat," (3) the authorities to be exercised, (4) "why the President believes such actions are necessary to deal with those circumstances" and (5) why such actions are taken with respect to a specific country. 50 U.S.C.A. § 1703(b) (Supp. 1983). Follow up reports to Congress are required every six months. 50 U.S.C.A. § 1703(c) (Supp. 1983).[2] Under IEEPA, Congress by concurrent

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[2] Presidents Carter and Reagan followed these procedures in connection with the Iranian hostage crisis, without any apparent difficulty. See Executive Orders No. 12170, 45 F.R. 65729 (Nov. 14, 1979), No. 12205, 45 F.R. 24099 (Apr. 7, 1980); No. 12211, 45 F.R. 26685 (Apr. 17, 1980); Nos. 12276-12284, 46 F.R. 7913 et. seq., (Jan. 19, 1981); No. [cont'd. on next pg]

resolution may terminate the state of emergency and the economic restrictions imposed by the President under it. 50 U.S.C.A. § 1706(b). But see Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983).

None of these procedures were followed by the President in the case of the Cuba travel-restricting regulations. There was neither prior consultation with Congress nor subsequent explanation of the justification as required by IEEPA. No separate national emergency was declared. Instead the Treasury Department simply published the regulations in the Federal Register, not even allowing for the usual advance notice and opportunity for comment provided in the Administrative Procedure Act, 5 U.S.C. § 553, apparently in reliance on the exclusion from the APA for "a

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12294, 46 F.R. 14111 (Feb. 24, 1981). See also Notice of President, 47 F.R. 50841 (Nov. 8, 1982).

military or foreign affairs function," Id. at § 553(a)(1).

The very exclusion of foreign affairs from the APA rule-making process increases the importance of the specific procedures of IEEPA designed to forestall possible precipitous action by the President without any opportunity for public discussion and Congressional input. IEEPA was one of a series of post-Vietnam statutes designed to curb unbridled exercise of asserted Presidential powers in foreign affairs. The Vietnam War involved a variety of secret actions undertaken by the United States government, including the bombing of Cambodia and domestic spying and break-ins. Other actions were taken by the President without prior consultation with Congress and without opportunity for public opinion to be heard, most tragically the invasion of Cambodia, which ultimately contributed to the coming to

power of the Pol Pot regime. Among the more important pieces of legislation by Congress in reaction to secretive or unilateral actions by the President were the War Powers Resolution, P.L. 93-148, 87 Stat. at 555 (1973), 50 U.S.C. §§ 1541-1548, the National Emergencies Act, P.L. 94-412, 90 Stat. 1255 (1976), 50 U.S.C. § 1601 et. seq., and IEEPA.

The need for a consultative process between Congress and the President is particularly compelling in light of the strained history between the United States and Cuba since the Cuban Revolution. Without consulting Congress, the President approved direct support to the invasion of Cuba by exiles at the Bay of Pigs. That abortive invasion was a factor in the development of the Cuban missile crisis which brought the world closer to nuclear war than at any other time. Later the CIA, in secret, enlisted the cooperation of the Mafia in attempts on the

life of Cuba's leader, Fidel Castro.[3] More recently, Cuba has charged that the United States is secretly responsible for dusting Cuban agricultural lands with harmful bacteria. New York Times, July 27, 1981, at 5. col. 1.

The President's deliberate failure to observe the requirements of IEEPA in promulgating the travel restricting regulations is another form of unilateral exercise of authority by the President, a particularly egregious one in light of the express provisions of IEEPA restricting the President's authority in the area of economic sanctions. Congress provided that economic sanctions may only be imposed when another country's actions are an "unusual and

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[3] Alleged Assassination Plots Involving Foreign Leaders: An Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligece Activities, S. Rep. No. 465, 94th Cong., 1st Sess. at 71 (1975).

extraordinary" threat to the national security and the President so declares. The argument of the Government that such a requirement "introduce[s] a dangerous and unnecessary rigidity into the conduct of our foreign policy" is one which should be addressed to Congress and not this Court, for it is Congress which imposed the national emergency requirement. As Justice Powell explained in a very similar context, "[t]o be sure, the President may have preferred unrestricted power but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority." Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764, 2796 (concurring opinion).

The Government does not dispute the fact that the President is bound by the requirements of IEEPA as to every country in

the world except Cuba, North Korea, Vietnam and Cambodia, the four countries as to which certain sanctions under the Trading with the Enemy Act were in effect when IEEPA was enacted. It offers no reason to support the nation that Congress intended to give the President greater flexibility in dealing with those four countries than with all the other countries of the world or why such additional flexibility was needed for those four countries. The Court of Appeals quite correctly concluded that "Congress intended the savings clause [50 U.S.C. § 1706(b)] to be narrowly interpreted to continue in effect only those restrictions actually exercised in July 1977. It did not want the existence of one sort of TWEA restriction in 1977 to serve as a justification for imposing a new one. In fact, it did not want the President to be able to use the old Act as statutory authority for anything new." 708 F. 2d at

798.

Indeed, the wish of the Government for unfettered authority with respect to new economic sanctions against Cuba is precisely what Congress sought to curb. The plain language of IEEPA demonstrates that Congress withdrew from the President the "flexibility" to impose new economic sanctions, restricting such action to the drastic situation where an "unusual and extraordinary" threat to the national security exists.

If the President believes such a threat is presented by Cuba he is free to declare a national emergency and impose any new sanctions within his power. But the President has not chosen to so declare. It borders on the bizarre for the Government to assert that the declaration of a national emergency as to Cuba might "significantly heighten tensions" between our country and Cuba in light of the history of the relations

of the past twenty-five years and their current status. The United States has not had formal diplomatic relations with Cuba for more than twenty years, has imposed an almost total economic embargo (except for travel) for over twenty years, has supported an invasion of Cuba and attempts to kill its leader. Recently, the Administration has dubbed Cuba as an agent of the Soviet Union and regularly, as in its brief herein, accuses Cuba of attempting to subvert and destabilize governments in Central America and the Caribbean. In these circumstances, the declaration of a national emergency (if one actually existed) would hardly make things worse.

The limitations which the Constitution places on the power of Congress to veto regulations renders more important than ever adherence by the Executive Branch to specific procedural requirements which must be

followed in promulgation of regulations. As Justice Powell noted, "the legislative veto is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies and preserves Congress' control over lawmaking." Immigration and Naturalization Service v. Chadha, supra, 103 S. Ct. at 2395. Since Congress may be unable to veto regulations such as those at issue herein, adherence to the requirements of IEEPA as to declaration of a national emergency and reporting to Congress are unusually important, particularly when the results of unilateral actions by the executive may ultimately lead to hostilities without the opportunity for Congress to exercise its powers unders its constitutional authority to declare war. "Oversight

hearings and Congressional investigations have their purpose, but unless Congress is to be rendered a think tank or debating society, they are no substitute for the exercise of actual authority." Id., 103 S. Ct. at 2795, n. 10.

This Court emphasized in its decision in Chadha, that "[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays encountered in complying with explicit Constitutional standards may be avoided, either by Congress or the President. With all the obvious flaws of delays, untidiness and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." Id., 103 S. Ct. at 2788.

What is true as to adherence to the

Constitution is equally true of adherence by all branches of Government to validly enacted laws. The Executive, in this case, has chosen to disregard the law.

II

THE REGULATIONS PROHIBITING EXPENDITURE OF FUNDS FOR TRAVEL TO CUBA EFFECTIVELY PREVENTS MOST CITIZENS OF THE UNITED STATES FROM TRAVELLING TO CUBA. ABSENT UNUSUAL AND EMERGENT CIRCUMSTANCES, SUCH A SWEEPING RESTRAINT ON TRAVEL VIOLATES THE FUNDAMENTAL RIGHT TO TRAVEL PROTECTED BY THE CONSTITUTION.

A. The Travel-Restricting Regulations Prevent Most Americans from Travelling to Cuba

The travel-restricting regulations adopted in 1982 prohibit the expenditure of any funds by United States citizens and others subject to the authority of the United States for travel to Cuba, with very limited exceptions. A general license is granted to (1) officials of the United States Government, a foreign government or

intergovernmental organizations but only on official business; (2) to journalists and professional researchers, and (3) persons visiting close relatives in Cuba. 31 C.F.R. § 515.560(a)(1). Even these exceptions are very limited. A member of Congress, or a federal judge, could not travel to Cuba to deliver a speech or to learn about Cuba's domestic situation or foreign policy unless on official business. State officials are totally outside the general license provision.

The definition of "professional research" is particularly narrow. 31 C.F.R. § 515.560(h). To qualify, one must not only be a "full-time professional" (undefined) but the research must be specifically related to Cuba, and there must be "a substantial likelihood of dissemination of the product of such research." A law teacher who desires to travel to Cuba to study its legal system or

particular aspects of Cuban law to provide comparative background for his or her teaching seemingly could not do so absent a likelihood of publication, see 31 CFR. §515.560 (h)(1), unless classroom lectures were considered "dissemination" of the product of research.[4]

Even those qualifying as professional researchers and meeting the "likelihood of dissemination" requirements are limited in their right to travel to Cuba. Travel is authorized only for research "specifically related to Cuba." Id. In addition, a "professional researcher" could not be accompanied by research assistants unless the assistants themselves are professional researchers or graduate students "working to

[4] The Treasury Department has ruled that "[g]eneral interest study tours, even when the prospective participants are professionals in various fields, do not constitute 'engaging in professional research.'" FOIA Request-Letter to Senator Glenn (Jan. 14, 1983).

qualify themselves academically as professionals." 31 C.F.R. § 515.560(h)(2) and (4). "Study visits to Cuba in connection with pre-college or undergraduate college course work are not within the scope of professional research and similar activities authorized by the general license." Id. Amici's FOIA request revealed that the Treasury Department has ruled that requests for study tours of Cuba as part of undergraduate courses or seminars at the University of Wisconsin, California State College at Stanislaus, the Abington Friends School, the Germantown Friends School and the Higher Education Consortium for Urban Affairs did not qualify for a general license and that it was against administration policy to grant special licenses for such purposes.[5]

[5] FOIA Request-Letters from the Treasury Department to Dr. Joel P. Lazinger (Aug. 13, 1982), to Professor Gary Shaw (June 15, 1983), to Senator Arlen Spector (September 14, 1982), and to Senator David Durenberger (Dec. 10, 1982).

In addition, the United Presbyterian Church and the Lutheran Church were both denied either a general or special license for study tours to Cuba by church youth groups.[6]

B. The Travel Restricting Regulations Prevent Scholars from Attending or Speaking at International Conferences on Scientific and other Academic Subjects

Because the travel-restricting regulations prevent attendance at a variety of international conferences, scholars from the United States are deprived of the opportunity to learn and exchange information and ideas merely because a conference occurs in Cuba. "Specific license requests pertaining to travel for attendance at professional meetings to be held after December 31, 1982, will generally be denied." 31 C.F.R. § 515.560(i). For

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[6] FOIA Request-Letters to Senator Cranston (July 9, 1982) and Senator Glenn (January 14, 1983).

example, in 1983, United States physicians and pharmacological researchers could not attend an international conferece on the important new drug Interferon because the conference was not "Cuba-specific." American Medical Association News, p. 66 (May 6, 1983).

Conferences in 1983 on sugar cane technology sponsored by the Congress of the International Society of Sugar Cane Technologists and by the Group of Latin-American and Carribean Sugar Exporting Countries were also off limits to American scholars because the subject matter was not Cuba specific. A United States scholar could not even present a paper at the conference since the subject is not Cuba specific.[7]

The range of interference in the scholarly and intellectual affairs of

[7] FOIA Request-Letter from Treasury Department to Rafael Pou (November 15, 1982).

citizens is illustrated by the range of international conferences which were off-limits due to the travel-restricting regulations. In 1983, these conferences included tropical diseases, health psychology, Latin American culture and mass communication, sports medicine, epidemology and the prevention of cardiovascular illness, pathology, architecture, geology and international broadcasting. (Source: Cuba Tourist News, 1983, published periodically). Those who did not qualify as "professional researchers" were denied the opportunity to attend a conference on primary health care in Cuba sponsored by the World Health Organization and the Pan-American Health Organization. The Cuban primary health care system has been suggested as a model for developing countries. An article in the New England Journal of Medicine, December 8, 1983, at 1468, notes that even

Cuba's detractors admit that the new government has made good on its "commitment to provide Cubans with medical care equal to any in the world" and speaks of "dramatic reversals in Cuban medical care that have been widely and prominently published in scholarly periodicals outside Cuba. In the United States, much of this news has been received with skepticism, or worse, has been ignored." Id. at 1472.

The scope of lost opportunities for United States citizens will be equally broad in 1984. In the health field alone, conferences in Cuba will be held on pediatrics, reconstructive surgery, anesthesiology, gynecology and obstetrics, dental prosthesis, cancer and radiation therapy, nursing care, oral surgery, health psychology, gastroenterology, proctology, health administration, hygiene and epidemilogy, and internal medicine and

cardiology. Cuba Tourist News (1984).

Victor Weisskopf, then Vice-Chairman of the Federation of American Scientists, emphasized the importance to scholars of personal exchanges and international contacts:

> It is obvious to anyone who knows scientific life that the personal exchange of ideas is a most important way of productive work. The mere reading of foreign literature can never replace the personal give and take ... International exchange of ideas and discussion is indispensable because details of scientific research are never written down in the actual publications. Frequently, only conversation can reveal a special technique or a special instrumental design which foreign scientists have used to make their experiments work. Only their presence can help our own scientists to put these experiments into use for discoveries for the development of our program. Hearings, Presidential Commission on Immigration and Naturalization, 82 Cong., 2d Sess. (1952) at 408.

C. The Travel-Restricting Regulations Retard the Activities of Human Rights Organizations in Reference to Cuba.

It is essential to the ability of organizations concerned with human rights that their representatives be able to travel without governmental permission to any country. Human rights groups such as amici WOLA and COHA send representatives to a variety of countries for several purposes including: (1) to investigate the status of respect for human rights and (2) to meet with govermental representatives to express concerns about alleged human rights violations. Despite the general reluctance of the Cuban government to receive human rights delegations from abroad, substantial information concerning the human rights situation in Cuba has been collected and disseminated, in part through the visits of representatives of human rights organizations. For example, Amicus COHA publishes annual reports on the human rights situation and press freedom in countries in

the Western Hemisphere, including Cuba. Amnesty Interational published a major study of the human rights situation in Cuba in November 1978 entitled "Memorandum Submitted to the Government of the Republic of Cuba" and publishes updates in its Annual Reports.

It is possible, but by no means certain, that some representatives of human rights organizations would be granted special licenses to travel to Cuba under 31 C.F.R. §515.560(b) authorizing special licenses "in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons." But the very necessity to obtain the special license undermines the effectiveness of the work of the human rights organization and the credibility of the information gathered and disseminated. Human rights groups cannot appear to be acting under the imprimatur of any government. A special license granted "in appropriate cases" is the very sort of

governmental approval human rights groups must avoid.

The operation of Amnesty International, the largest membership-based human rights group, illustrates the need for independence of goverment in human rights activities. Amnesty International requires its local membership group to adopt a "prisoner of conscience" in each of three international sectors -- Western capitalist nations, Communist nations and Third World nations.

When fundamental rights, such as the right to travel are involved, this Court has refused to sanction the power of government to license their exercise. In Thomas v. Collins, 323 U.S. 516, 540 (1945), this Court held that "a requirement that one must register before he undertakes to make a published speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

See also Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943) ("a state may not impose a charge [a license tax] for the enjoyment of a right granted by the Federal Constitution.") In Cantwell v. Connecticut, 310 U.S. 296 (1940), this Court struck down a city licensing statute as applied to a religious group soliciting funds, stating that "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." Id. at 307. Accord: Lovell v. Griffin, 303 U.S. 444 (1938). The special licensing provision in the travel-restricting regulations, with its vague, discretionary standard of "in appropriate cases," also represents a similar, unbounded licensing restriction on

the fundamental right to travel.[8]

D. The Travel-Restricting Regulations Burden the Development of Mutual Understanding Between Cuban and United States' Citizens Necessary to Reduce Tensions Between the Goverments and to the Maintenance of Peace in the Hemisphere.

Pope John XXIII, in the Papal Encyclical, Pacem in Terris, said:

> There is reason to hope, however, that by meeting and negotiating, men may come to discover better the bonds that unite them together, deriving from the human nature which they have in common; and that they may also come to discover that one of the most profound requirements of their common nature is this: that between them and their respective peoples it is not fear which should reign but love, a love which tends to express itself in a collaboration that is loyal, manifold in form and productive of many benefits ... From the fact that human beings are by nature social, there arises the right of assembly and association.

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[8] The authority for special licenses is itself limited to persons desiring to go to Cuba for humanitarian reasons or for purposes of public performances, public exhibitions, or similar activities. 31 C.F.R. § 515.560(b). Special licenses are not available to other travellers, even to those wishing to attend international conferences. 31 C.F.R. § 515.560(i).

Quoted in Zemel v. Rusk, 381 U.S. 1, 24-25 (1965).

President Eisenhower, speaking at the Heads of Government Meeting in Geneva, exhorted the members "[t]o lower the barriers which now impede the opportunities of people to travel anywhere in the world for peaceful, friendly purposes, so that all will have a chance to know each other face to face." 33 Dep't. St. Bull. 174, 175. Secretary of State Dulles said:

> No better formula for arousing mutual interest and creating mutual understanding has been found than physical and spiritual contact among the peoples of the world. It makes little difference whether international travel is motivated by business, cultural, scientific, or purely recreational interests. The fact is that the international contact resulting from such travel, in each instance, dispels prejudices and narrows the gulf between people of different nationalities. 38 Dep't. St. Bull. 689 (1958).

Recently, the president of Columbia University, Michael Sovern, seeking to surmount what he termed a direct link in the

United States between "lack of knowledge and lack of diplomatic success" proposed that a federally financed National Endowment for International Studies be created. Professor Sovern said that additional activities in schools and colleges not necessarily part of the new endowment ought to be more vigorously supported, including student exchange programs. Mr. Sovern also said that:

> The conduct of a democracy's foreign policy is too profoundly influenced by domestic politics for us to settle for training specialists ... We must have a well-informed citizenry ... How can we guard against the illusionary and the irrational in American foreign policy -- a failing that has plagued administrations of both parties? The answer ... is knowledge, by which I mean more knowledge, deeper understanding, a willingness to face complexity rather than hide behind rhetorical shields, an ability to analyse information dispassionately ... an informed insight into the heritage and value system of cultures far different than our own. N.Y. Times, Jan. 25, 1984, at B1., col. 1-4.

Perhaps there is no historical material

more relevant to the advisability of permitting travel to Cuba than this nation's turnaround in its troubled relationship with China. After the Chinese Communist Revolution in 1949, the United States almost cut off all contact with China for almost twenty years. The prevailing view in the United States was that Communist nations are monolithic and therefore should all be treated equally as enemies. We now know how inaccurate this view actually was. China developed into a major antagonist of the Soviet Union, and the two countries have tied up a substantial portion of their military resources along their mutual border. These antagonisms began to evolve quite early in the history of Communist China, but their recognition in the United States was long delayed due in part to the self-imposed isolation of the United States from China. However, beginning in 1968, even with the

Vietnam War raging and China the principal supporter of North Vietnam, successive administrations realized the advantage to opening the doors to communication and exchange at both governmental and person-to-person levels.

Eugene Rostow, then Undersecretary for Political Affairs, said in 1968:

> We would see an end to this isolationist, exclusivist attitude in Asia .... We have made clear our willingness to welcome Chinese scientists, scholars and journalists to the United States and have encouraged our own academics to establish contact with their counterparts on the mainland of China. To facilitate these contacts we have eased restrictions on travel to Communist China ... It is our hope ... that one day the barriers which the Chinese have guarded with such fierce determination will begin to crumble on their side, just as we have ourselves pushed aside barriers which once existed in our policy. 48 Dep't. St. Bull. 741, 747 (emphasis added).

The change in policy marked by Rostow eventually led to President Nixon's historic trip to China. On his return the President

said:

> As we succeed in reducing the danger of war, ... we must also work at enhancing the quality of peace. One of the best ways of doing this is through people-to-people contacts -- contacts aimed at reducing the fear and the ignorance which have divided mankind down through the ages and at fostering habits of trust and patterns of cooperation. That was one of the major purposes of the visits Mrs. Nixon and I made to the People's Republic of China and to the Soviet Union ... [N]ations, like individuals, stand a better chance of working constructively together if people on both sides can learn to respect one another as fellow human beings. 67 Dep't. St. Bull. 134 (1972).

The concept of free international travel and the recognition of travel as a fundamental human right was embodied in the Final Act of the Conference on Security and Cooperation in Europe (the Helsinki Agreement) 73 Dep't. State Bull. 323 (1975), which President Ford signed on behalf of the United States. That agreement, stated that the participating States consider the development of human contacts "to be an

important element in the strengthening of friendly relations and trust among peoples" and would "[m]ake it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states." Id. at 339.

When President Carter removed restrictions on travel to Cuba, he expressly equated his action with a commitment to fundamental human rights, 76 Dep't. St. Bull. 332 (1977) and to our obligation under the Helsinki Agreement, stating:

> I have long been concerned about our own nation's stance in prohibiting American citizens to travel to foreign countries. We also are quite eagerly assessing our own nation's policies that violate human rights as defined by the Helsinki Agreement. Later on this year we'll go to Belgrade to assess the component parts of the Helsinki Agreement. And I want to be sure that we don't violate those rights. So I've instructed the Secretary of State to remove any

> travel restrictions on American citizens who want to go to Vietnam, to North Korea, to Cuba and to Cambodia. 76 Dep't. St. Bull. 305 (1977).

One year later, Congress codified the spirit of the Helsinki Agreement when it amended the Passport Act "[f]or the purpose of achieving greater United States compliance with the provisions of the final Act of the Conference on Security and Cooperation," Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978).

The Government's contention that the regulation at issue does not regulate travel but is addressed "entirely to economic transactions," is not without irony in the wake of the Helsinki Agreement. Our government was highly critical of European Communist nations advancing the excuse of lack of hard currency to justify the prevention of their citizens from travelling internationally. See, e.g. N.Y. Times, Dec.

17, 1972, at 12, col. 3, where it was reported that in preparation for the Helsinki Conference, Western diplomats "scoff" at the argument of Communist countries that they do not have enough hard currency to permit unrestricted travel, "saying Communist reluctance to open travel and cultural gates is based more on ideology than economics ... [Even] if Western Governments provided advantageous exchange rates, or private organizations offered special funds, to promote travel ... a Polish ideologist conceded that such a proposal would create 'tensions' at home."

E. The Prohibition on Travel Expenditures Directly Interferes with Travel to Cuba

It is so apparent that travel requires expenditure of money that the Government's argument that the regulations are only "incidental" burdens seems difficult to

understand. The facial inaccuracy of the government's argument is clear from the decisions of this Court recognizing that expenditure of money is necessary for the exercise of constitutionally protected rights. In Buckley v. Valeo, 424 U.S. 1 (1976), this Court held that a restriction on the amount of money an individual may spend in a political campaign violates the First Amendment. "This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." Id. at 19. The Court also recognized that "[p]acing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 299 (1981). Further, the Court has recognized in a long line of cases the relationship between the solicitation of funds and the exercise of Constitutional rights. In 1940, Cantwell v.

Connecticut, 310 U.S. 296 (1940) struck down an ordinance requiring a license for solicitation of funds by a religious organization. Murdoch v. Pennsylvania, 319 U.S. 105 (1943), struck down a license tax on soliciting funds for religious purposes, the Court stating that "[i]t is plain that a religious organization needs funds to remain a going concern ... Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way." Id. at 111. See also Martin v. Struthers, 319 U.S. 141, 146 (1943), Grosjean v. America Press Company, 297 U.S. 233 (1936). More recently, this Court noted that "soliciting funds involves interests protected by the First Amendment's guaranty of freedom of speech." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980). The opinion made clear that "[o]ur cases long

have protected speech even though it is in the form of ... a solicitation to pay or contribute money," id. at 633, citing New York Times Company v. Sullivan, 376 U.S. 254 (1964) involving application of the First Amendment to solicitation of contributions by newspaper advertising, and Bates v. State Bar of Arizona, 433 U.S. 350 (1977), involving commercial solicitation.

The interference with travel is greater here than in most of the cited First Amendment cases. For most Americans, the prohibition on travel expenditures to Cuba is total. In contrast, Buckley involved Presidential elections in which millions of dollars of government campaign subsidies are available, substantial contributions are permitted and alternative means of communication, such as door-to-door canvassing and grass roots organizing are available. There is no alternative for a

traveller who cannot purchase his or her daily needs. That "hosted" travel (paid for in Cuba) is a possibility for a handful of Americans does not excuse the interference with travel for most of our people. The Constitution protects the right to spend one's own resources in the exercise of fundamental rights, Buckley v. Valeo, supra, and does not permit the Government to restrict such rights to cases where a foreign nation, or its people, are willing to extend charity to citizens of the United States.

F. The Travel-Restricting Regulations Unconstitutionally Interfere with Travel by American Citizens

Beginning with Kent v. Dulles, 357 U.S. 116 (1958), this Court has repeatedly recognized that international travel is a constitutional right protected by the Fifth Amendment. See Haig v. Agee, 453 U.S. 280 (1981). Moreover, the Court in Kent

emphasized the concepts developed by Professor Zechariah Chaffee linking the freedom of travel with First Amendment values, particularly the "right to know." Kent stated that the right to travel rests in part on the contribution to citizenship by enabling Americans "to be well-informed on public issues thus making sounder decisions at home because a well travelled citizen is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers." Id. at 126-27, quoting from Z. Chaffee, Three Human Rights in the Constitution of 1787 195-96 (1956).[9] The right to know has been

[9] Senator Sam Ervin has written that "When the people do not know what their government is doing, those who govern are not accountable for their actions — and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion." Secrecy in a Free Society, 213 The Nation 454, 456 (1971).

recognized as an integral part of free expression. As summarized in Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748, 756-57 (1976):

> Freedom of speech presupposes a willing speaker. But where a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In Lamont v. Postmaster General ... the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in Kleindienst v. Mandel ..., we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech "necessarily protects the right to receive." And in Procunier v. Martinez ... where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the mail was addressed. There are numerous other expressions to the same effect in the Court's decisions.

Any restriction on right to travel thus must be subject to heightened judicial

scrutiny, measuring "the extent of governmental restriction imposed [and the] extent of the necessity for the restriction." Zemel v. Rusk, 381 U.S. 1, 14 (1965). The extent of the restriction here is extremely wide, as discussed above. The governmental interests asserted here do not outweigh the fundamental values inherent in the right to travel. Basically, the government contends that it is free to impose travel restrictions to influence the policies of other nations which the Government considers hostile to the interests of the United States. And the Government asserts it may do so even absent a situation involving a national emergency, for the President did not declare a national emergency as the basis for the travel-restricting regulation. Such a raw assertion of Executive power over a fundamental right undermines the very notion of constitutional protections afforded such

rights.

The difference in circumstances herein and those prevalent in the two cases in which this Court upheld travel restrictions are marked. Zemel v. Rusk, supra, involved passport restrictions on travel to Cuba in the aftermath of the Cuban missile crisis which brought the nation to the edge of war. Haig v. Agee, supra, involved a travel restriction imposed on a single individual who was a former CIA official and who, the government asserted, was engaged in travel for the purpose of exposing other agents to possible reprisals, including assassination.

Finally, the Government argues that the travel-restricting regulations are necessary to limit the flow of hard currency to Cuba, and particularly to discourage the development of a Cuban tourist industry that would attract many Americans. Yet the amounts of money presently affected by the

regulation are small, only eight million dollars in the year preceding its promulgation (J. 19), hardly an amount justifying a ban on travel for almost all Americans. Furthermore, the Government continues to permit several hundred million dollars of hard currency to flow to Cuba each year from foreign subsidiaries of American corporations. Id.

The timing of the travel restrictions is also contrary to constitutional considerations, particularly the requirement that any restrictions on fundamental rights be imposed in a manner least restrictive of those rights. Restricting expenditures for travel at a time when the dollar volume to Cuba is so low is not the least restrictive alternative. Whether Cuba actually will develop such a tourist industry is a matter of speculation not warranting interference with travel at this time. There is time

enough when and if the Cuban tourist industry becomes a reality to restrict expenditures, assuming the President has the statutory and constitutional authority to do so then. It is, after all, the tourist dollars that the Government is concerned with, not the construction of hotels in Cuba.

The premature quality of the regulations also violates the First Amendment principles embodied in the fundamental right to travel. Speech cannot be punished or prohibited except where there exists a "clear and present" or "imminent" danger of a substantive evil which the Government may suppress. Brandenburg v. Ohio, 395 U.S. 444 (1969). The "substantive evil" of a large flow of dollars is not imminent or even present foreseeable. It is far too early to restrict the rights of Americans to travel and to learn for themselves about conditons in Cuba. Mere assertions of national

security interests has never justified wholesale restrictions on fundamental rights. In United States v. Robel, 389 U.S. 258 (1967), in invalidating a statute which made it a crime for any member of the Communist Party to hold employment at a defense facility, the Court stated:

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile. Id. at 264.

Americans need not rely on journalists or professional researchers or government press releases to learn about other countries. The Constitution gives all

Americans the opportunity to go and learn for themselves about the life, people and governments of foreign lands. Kent v. Dulles, 357 U.S. 116, 126-27. Only the most immediate and compelling circumstances can justify a restriction on the individual's right to travel and learn. Such circumstaces are not present in the case of Cuba today; perhaps the very freedom to travel to exchange information and to break down the barriers of suspicion bred from ignorance, will contribute to that day never arriving.

Respectfully submitted,

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